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No. 77-1864

In the Supreme Court of the United States

OCTOBER TERM, 1978

ROY H. WHITE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner seeks review of his conviction for tax evasion on the ground that the trial court erred in admitting testimony of internal revenue agents concerning admissions made by petitioner's attorneys to the agents.

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of three counts of evasion of income taxes for 1970-1972, in violation of 26 U.S.C. 7201 (Pet. App. 2a). The trial court sentenced petitioner to a term of one year and a day on each count, the sentences to run consecutively. The court of appeals affirmed (Pet. App. 2a-3a).

1. Insofar as petitioner complains (Pet. 16-18) about the testimony of an internal revenue agent concerning admissions made in petitioner's presence by his attorneys,

the pertinent facts are as follows: On January 23, 1973, during the course of the investigation of petitioner, Agent Charles Gavette of the Internal Revenue Service and another agent met with petitioner and his attorneys, John J. Raymond, Sr. and John J. Raymond, Jr. (II Tr. 60-61).[1] Agent Gavette testified that petitioner's attorneys told him at that meeting that petitioner kept no records (II Tr. 69-70). They also told Gavette the net worth method, which was being used in the preparation of a tax return for petitioner, would be based on information that had been provided to them by petitioner (II Tr. 70). They further told Gavette that it was their procedure for John J. Raymond, Sr. and Jr. to take turns interviewing petitioner on alternate appointments in order to check the accuracy of what petitioner had told them (II Tr. 69).[2] Prior to the time the attorneys had made these statements, petitioner had executed the standard Internal Revenue Service Form 2848, appointing John J. Raymond, Sr., John J. Raymond, Jr., and Joseph F. Dillon as attorneys-in-fact to represent him before any officer of the Internal Revenue Service with respect to "income tax matters for the years 1960 through 1971" (Ex. 30; II Tr. 61-62).[3]

The decision below correctly held that these statements were admissible. As the court of appeals concluded, the statements in question were made by petitioner's

[1]"Tr." refers to the trial transcript.

[2]Petitioner does not specify in his petition the statements made in his presence which he now claims are inadmissible. At trial, petitioner's attorney objected to the agent's testifying as to what John J. Raymond, Jr., said was the procedure employed in interviewing petitioner (II Tr. 62-68).

[3]Petitioner executed a second power of attorney appointing John J. Raymond, Sr., Joseph F. Dillon and Sander L. Minkow as attorneys-in-fact with respect to the years 1960 through 1972 (Pet. App. 14a). The second power of attorney added the year 1972.

authorized representatives and concerned a matter within the scope of the attorneys' authority, *viz.*, petitioner's income tax liability for the years in question. Moreover, petitioner made no objection at the time his attorneys made the statements to the agent. They were accordingly admissible under Rule 801(d)(2) of the Federal Rules of Evidence. *United States* v. *Ojala,* 544 F. 2d 940, 945-946 (C.A. 8); *United States* v. *O'Connor,* 433 F. 2d 752, 755 (C.A. 5); *United States* v. *Dolleris,* 408 F. 2d 918, 921 (C.A. 6).

Petitioner nevertheless contends (Pet. 7) that the application of Rule 801 in criminal cases violates per se the Confrontation Clause of the Sixth Amendment.[4] But it is well settled that the right to confront witnesses does not require that all hearsay evidence be excluded. *Dutton* v. *Evans,* 400 U.S. 74, 80; *California* v. *Green,* 399 U.S. 149, 156; *Salinger* v. *United States,* 272 U.S. 542, 548; *Mattox* v. *United States,* 156 U.S. 237, 240-244. The admissibility of adoptive admissions and admissions by an agent within the scope of his authority has long been established, and Rule 801 is in complete harmony with the view that these types of statements do not constitute inadmissible hearsay. See IV Wigmore, *Evidence,* §§ 1069, 1071, 1078 (1972 ed.). Admissions made by petitioner's agents, in the course of exercising their authority to act in petitioner's place, are not different from admissions made

[4]Petitioner's reliance (Pet. 11) upon Rule 26 of the Federal Rules of Criminal Procedure is misplaced. Rule 26 provides that "[i]n all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by * * * the Federal Rules of Evidence, or other rules adopted by the Supreme Court." Rule 801, Federal Rules of Evidence, applies to criminal cases as well as civil cases. See *United States* v. *Ojala, supra,* 544 F. 2d at 946.

by petitioner himself, particularly where he was present and registered no complaint when the statements were made. See IV Wigmore, *supra,* at §§ 1071, 1078. See also *United States* v. *Weaver,* 565 F. 2d 129, 135 (C.A. 8).

2. Petitioner further contends (Pet. 5, 7-16) that the trial court erred in admitting the testimony by Agent Stephen Howard concerning certain statements made by petitioner's attorneys out of his presence to the effect petitioner kept no records and was not cooperating with them. The court of appeals held that these statements should not have been admitted because they were conclusory observations that were not sufficiently relevant to qualify as an exception to the hearsay rule. It concluded, however, that their admission was harmless error in the context of the case (Pet. App. 3a).[5]

Even on the assumption that the court of appeals correctly held that the admission of these statements was error, such error was "harmless beyond a reasonable doubt." *Chapman* v. *California,* 386 U.S. 18. The court of appeals reviewed and considered the statements in the context of the record as a whole and determined that the error did not adversely affect the substantial rights of the petitioner and was harmless. Fed. R. Crim. P., Rule 52(a).

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[5]We do not concede that these statements were inadmissible. The court of appeals based its decision on the ground that the statements were admitted as "an exception to the hearsay rule" (Pet. App. 3a). But the statements are admissible, not as exceptions to the hearsay rule, but as statements which by definition are not hearsay at all. See Rule 801(d), Fed. R. Evid. These statements were made by petitioner's authorized representative and referred to petitioner's income tax matters for the years in question. Accordingly, they are admissible even though they were not made in petitioner's presence. *United States* v. *Dolleris, supra,* 408 F. 2d at 921; *United States* v. *O'Connor, supra,* 433 F. 2d at 755-756; Rule 801(d)(2)(C) and (D). Nor does the admission of such statements by petitioner's agent violate the Confrontation Clause (see *supra,* pp. 3-4).

The admission that the petitioner kept no records and was uncooperative with his attorneys was merely cumulative of other similar evidence. The same admission was made in petitioner's presence in the January 23, 1973 meeting (II Tr. 69-70). The business manager of the basketball team owned by petitioner stated that no records of any substance were kept for that business (II Tr. 11-17). An employee of petitioner's bail bonding business who generally took care of the business and wrote bonds likewise stated that he had not kept any records of that business (II Tr. 37). The accountant hired by the law firm to prepare petitioner's 1972 tax return also testified he was not provided with any income records in the bail bonding business, the basketball team or anything that reflected rental receipts for the various rental properties owned by petitioner (III Tr. 42-43). A letter to the accountant from petitioner similarly stated that he didn't have the facts to "construct books and records in all the business natures [*sic*] that I'm connected with" (III Tr. 35; Ex. 47). There were also substantial omissions in the information provided by petitioner to the accountant as to his acquisition of assets during 1972 (IV Tr. 158).

Finally, the evidence of petitioner's intent to evade income taxes was overwhelming. The government proved substantial understatements of taxable income by the net worth method using the testimony of an expert witness and stipulations of fact. The understatements of income taxes for 1970 and 1972 were respectively $15,265.90 and $36,043.29 (II Tr. 164). In 1971, the year petitioner failed to file a return altogether, petitioner had income of $89,506.07 (II Tr. 164). Moreover, the stipulations reflect that a large portion of petitioner's numerous dealings were transacted in cash, involving tens of thousands of dollars and that he did not even maintain a checking

account until 1972, and then only in connection with one of his businesses (Stip. I, App. A, p. 4). There was also evidence that petitioner repeatedly misled his various income tax preparers and the internal revenue agents as to his true income (I Tr. 89-94; II Tr. 58; III Tr. 36, 91). Indeed, petitioner told internal revenue agents that in 1971 the only income he had was $500 to $600 from driving a school bus (II Tr. 58). In light of this evidence, the court of appeals correctly concluded that any error in admitting the statements of petitioner's attorney made outside of petitioner's presence was harmless beyond a reasonable doubt. See *Lutwack* v. *United States,* 344 U.S. 604, 619-620.[6]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

SEPTEMBER 1978.

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[6]Petitioner also contends (Pet. 15-16) that the statements made by his attorneys violated his Fifth Amendment privilege against compulsory self-incrimination. Petitioner, however, has in no way been "compelled" to be a witness against himself. Absent "physical or moral compulsion" exerted on the person asserting the privilege, there is no basis for such a Fifth Amendment claim. *Fisher* v. *United States,* 425 U.S. 391, 397.

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